

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1022
To Be Argued By
JOSEPH I. STONE

UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ENRIQUE HERNANDEZ,

Defendant-Appellant.

71 Cr. 874

Eastern District of New York

to

Second Circuit

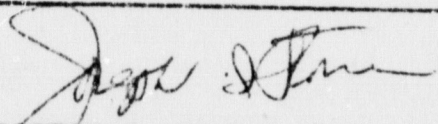
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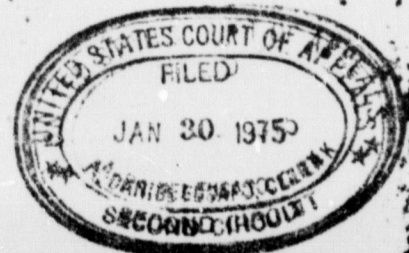
ON APPEAL FROM THE UNITED STATES DISTRICT COURT

THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR DEFENDANT APPELLANT

ENRIQUE HERNANDEZ


JOSEPH I. STONE, ESQ.
Attorney for Defendant-appellant
Office & P.O. Address
277 Broadway
New York, New York 10007



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PRELIMINARY STATEMENT

The defendant, Enrique Hernandez, appeals from a denial of his motion for a new trial, said denial having been made by Hon. Jack B. Weinstein, United States District Judge, on November 15, 1974, after hearing testimony.

The defendant Hernandez, along with many others, was convicted in 1971 in the Eastern District of New York, (71 Cr. 874) . The case was heard by the Second Circuit Court of Appeals and was affirmed from the bench. Certiorari was subsequently denied. The undersigned represented Hernandez on his appeal before the Second Circuit pursuant to an assignment under the Criminal Justice Act and represented him on the hearing before Judge Weinstein pursuant to the same assignment. At trial, Mr. Hernandez was represented by Vincent Lanna, Esq., of Yonkers, New York.

The main issue urged by Hernandez in applying for a new trial was the fact that the government had used illegal wiretaps and certain police officers who had testified in his case had committed perjury at the trial.

The government admitted the illegality of certain wiretaps and admitted that certain officers committed perjury. However, it was the government's position that

the illegal wiretap was not instrumental in the conviction of Hernandez and that the "perjured" witness was not the witness whose testimony formed a major portion of the evidence against Hernandez.

After a hearing, Judge Weinstein denied Hernandez' motion for a new trial without entering a written opinion.

STATEMENT OF FACTS

The statement of facts in the original case was presented to this Court in 72-1335. The record in the case consisted of almost 3,000 pages and included the testimony of co-defendant Mario Sepulveda and wiretap communications based on a court order and wiretaps of Hernandez' phone pursuant to a court order on September 25, 1970. Hernandez never received notice that his phone was tapped. However, this court claimed that he had waived his notice in a subsequent 2255 petition. Judge Weinstein refused to hear testimony on this issue.

In the original trial, narcotic drugs were seized by Officer Sottile and others from one Nicodemus Olate Romero (a fugitive at the original trial but now a government informant). The jury had the opportunity of viewing the narcotic drugs during Hernandez' original trial which was allowed into evidence since a conspiracy

allegedly existed. Sottile testified falsely at the original trial concerning the seizure of these narcotic drugs. He stated that the illegal wiretap was installed prior to the arrest of Olate Romero and Quintinella (26H). He also stated that he did not advise the court or the United States Attorney that the information he received prior to going to the Century Paramount (the hotel where Olate was arrested and the drugs were seized) was information from an illegal wiretap (27H). Sottile also testified that at the time of these illegal taps, he was working with Officers Rivera and Martinez. He also testified that the conversations overheard on the wiretap were in Spanish (22H). He testified that he didn't hear the name of the ship Maipo over the illegal wiretap but he had no independent recollection of exactly what he remembers hearing or what he was told came over the wiretap because of the Spanish language. Judge Weinstein refused permission to bring the Spanish-speaking officers to testify in this matter since they were not the arresting officers of Hernandez nor did they testify directly concerning Hernandez' involvement or alleged involvement in the conspiracy.

The coordinating, supervising officer of the New York City Narcotics Bureau at that time was Lieutenant Egan (public records and newspaper reports indicate that he has been convicted of several offenses himself). Detective Owen Brodeur testified. He was the officer who swore to the affidavit that resulted in the court issuing a wiretap intercept order on Hernandez' phone in 1970. He testified that he had no conversation with Sottile or Lt. Egan concerning the illegal wiretap at the Chile Linde Restaurant. Sottile admitted that he lied at the trial before Judge Weinstein (31H). The defendant Hernandez testified himself that he had been to the Chile Linde Restaurant on many occasions, that he used the telephone to conduct illegal narcotics activities; that he discussed narcotics with co-defendants James Miller, Madeline Pineda, his two brothers and testifying defendant Mario Sepulvedo (44-46H).

QUESTION PRESENTED

1. CAN THE GOVERNMENT SUSTAIN A CONVICTION
ON THE BASIS OF PERJURED TESTIMONY?

ARGUMENT

POINT I

Pure perjury is pure perjury and it is very difficult in today's world to determine how a jury would react when they find that any government witness has testified falsely about a material fact. The United States Court of Appeals in U.S. v. Mele, et al., 462 F. 2d 918, went into great detail concerning the suppression of certain testimony, the misrepresentations by the government agents and the curtailment of defense counsel's scope of cross examination and reversed the convictions of all defendants. Justice Clark, writing for the court, stated,

"The very least required of the Government was a complete disclosure of the truth to the district court in camera so that the balance of interest could be struck by one not involved in the all too 'often competitive enterprise' of prosecution. United States v. Varelli, 407 F. 2d 735 (7 Cir. 1969); United States v. Palermo, 410 F. 2d 468 (7 Cir. 1969). Particularly since the withheld evidence and the doctored reports were highly material to this case and would so clearly have affected the preparation of a defense, it is clear that some disclosure would have been required. United States v. Roviato, 353 U.S. 53, 63-64 (1957)."

The petitioner realizes he has a burden to show that the newly discovered evidence could have introduced a reasonable doubt in the minds of enough jurors to avoid

a conviction, U.S. v. Kahn, 472 F. 2d 272. A new trial is also required when the evidence is favorable or material to the defense, Giglio v. U.S., 405 U.S. 150, Brady v. Maryland, 373 U.S. 83. There is no claim that the prosecuting attorney in this particular case knew that Sottile was testifying falsely at the time of the trial and therefore a strict reading of Napue v. Illinois, 360 U.S. 264, may not be applicable except for the dicta opinion which stated that a new trial must be ordered when the newly discovered evidence could "in any reasonable likelihood have affected the judgment of the jury", Napue (supra). It is very difficult to determine how a jury thinks and what they will consider important and unimportant. The present climate of jurors is to dislike wiretaps and to dislike them even more when they are illegal. The jury in the Hernandez case may very well have rejected all of the wiretap evidence and rejected the testimony of all of the detectives because they knew that one wiretap was illegal.

Furthermore, the narcotics drugs seized as a result of this illegal wiretap would have been suppressed and would have given the jury less opportunity to think that this was a large narcotics conspiracy and they may

have been more prone to acquit if they thought it was a smaller conspiracy and that certain detectives and/or agents were testifying falsely. I would think that it is easier to acquit a "small-time criminal" than one of major proportions. Accordingly, since this was a jury trial originally and we have no way of analyzing the thought process of each and every juror, Judge Weinstein erred in not granting Hernandez a new trial and his decision of November 15, 1974, should be overruled and this Court, in applying the due process doctrine, should emphatically state that no criminal conviction can be sustained when any perjured testimony is offered by the government. This is a double standard, but I think it is necessary and should be adopted by this circuit.

CONCLUSION

The original judgment and conviction entered against Enrique Hernandez should be reversed and a new trial ordered.

Respectfully submitted,

Joseph I. Stone
JOSEPH I. STONE
Attorney for defendant
Office & P.O. Address
277 Broadway
New York, New York 10007

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EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

ENRIQUE HERNANDEZ

71 Cr. 574

E.D.N.Y.

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-v-

Defendant.

71 Cr. 874

TO: CLERK OF THE COURT
TO: UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
TO: WARDEN
U.S. PENITENTIARY
LEWISBURG, PENNSYLVANIA

Excerpts from testimony

JAMES SOTTILE, called as a witness, being first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION BY MR. STONE:

(22H)

Q On the fourth day of September of 1970, did Romero, Quintanilla, Borrone-Iglar, Mario Sepulveda, and Celestino Valverde or any combination of those names have a conversation that you overheard on the illegal wiretap?

A No.

Q You're sure of that?

A As I said, I didn't listen to the wiretaps because I didn't know. There was Spanish, but there was no conversations about any of these people. It was only by the photographs I had taken that I learned their names, years later.

(26H)

Q During that early period of time, September, was the illegal wiretap already installed?

A I was definitely installed prior to the arrest of Olate and Quintanilla.

(27H)

Q Did you advise the Court or the United States Attorney that some of the information you received prior to going to the Century Paramount was information from illegal wiretap?

A No.

CROSS EXAMINATION BY MR. CLAYMAN:

(31H)

THE COURT: Did you lie at the trial before me?

THE WITNESS: Your Honor, with respect to the fact that I originally went to the Century Paramount as a result of what an informant told me, I lied...

oOo

ENRIQUE HERNANDEZ, Called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION BY MR. STONE:

(45H)

Q Did you ever have occasion to use the telephone at the Chile-Lindo bar or restaurant?

A Quite a few times.

Q Could you tell us when you used their phone and who you talked to?

A Well, I mostly in around September, I called

Madelaine Pineda quite a few times. I called my brother and I called James Miller,

Q Which brother did you call, or both?

A Both.

Q On any of the conversations you had with any of these people, was it related to narcotic drugs?

A Yes.

Q Did you know that the Chile-Lindo telephone was tapped?

A No.

Q Did you use your name when you made these phone calls?

A Yes..

Q Did you ever receive any telephone calls at the Chile-Lindo Restaurant?

A Quite a few.

Q From who?

A From Madelaine Pineda, Mario Sepulveda, and my brother, Martin Hernandez, and my brother Victor Hernandez.

Q While you were home, did you ever receive calls from any person who informed you they were at the Chile-Lindo Restaurant?

A Yes.

Q Who?

A Mario Sepulveda, Madelaine Pineda and Victor

STATE OF NEW YORK
COUNTY OF NEW YORK ss:

MARIE CLAUSI, being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 90 Bay 28th Street, Brooklyn, New York.

ON the 30th day of January, 1975 deponent served the within Brief and Appendix upon the United States Attorney, Eastern District of New York at 225 Cadman Plaza, Brooklyn, New York.

Marie Clausi
Marie Clausi

Sworn to before me on January 30, 1975.

Joseph Stone

JOSEPH E. STONE
NOTARY PUBLIC, State of New York
No. 00-101327
Qualified in Nassau County
Commission Expires March 30, 1978